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# THE VISUAL AND THE LAW OF CITIES

Stephen R. Miller\*

## I. Introduction

*"Man only knows himself insofar as he knows the world—the world which he only comes to know in himself and himself only in it."*<sup>1</sup>—Goethe

It is expected that law, whether religious or secular in origin, is a textual discipline, and that no matter what law's subject, the legal discourse will be conducted in words, and that the meaning of law will depend upon textual interpretation.<sup>2</sup> There are several areas of law, however, that challenge that general supposition, and where the visual is as important as the text in framing the law and rendering legal decisions. Among those are the allied fields of law that deal with building, construction, architecture, planning, developing, preserving, and otherwise creating the places where we live. For lack of a better term, I will call these fields—sometimes individually referred to as land use law, real estate law, construction law, and so on—the law of cities. Admittedly, there is no law school class or practitioner treatise upon the law of cities, but it will be helpful, for purposes of this article, to have a shorthand to reference the multifarious collection of place-making laws.

By law of cities, I also do not intend to limit the discussion to urban areas. Rather, "cities" is used here to connote the larger conception of such entities inclusive not only of their

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1. RICHARD SENNETT, *THE CONSCIENCE OF THE EYE: THE DESIGN AND SOCIAL LIFE OF CITIES* vii (W.W. Norton & Co. 1992).

2. See, e.g., *John* 1:1 (King James) ("In the beginning was the Word, and the Word was with God, and the Word was God."); see generally ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

urban areas, but also suburbs, adjacent new towns, rural towns and hamlets, and the hinterlands of cities. As such, the law of cities, as used in this article, is intended to address the entirety of the possibility of settlements, excluding only those areas of wilderness either intentionally set aside or otherwise not exploited by human endeavor.<sup>3</sup>

This article will attempt to explore, through four separate “tableaux,” or brief sketches, four ways in which the visual interplays with the law of cities, and how a deeper understanding of this intersection can assist in the development of these laws and their underlying policies. This discussion will by no means be definitive. However, by presenting these four approaches in which the visual complicates and assists the law of cities, and sometimes even acts as the law of cities, it is hoped the article will spur a dialogue on the law’s relationship to the visual.

First, the article explores the law’s longstanding adverse relationship to the visual, as well as general efforts to change that relationship. The article then turns to the four tableaux that explore the law of cities and the visual, each of which presents a different factual situation that explores how the visual relates to the law of cities. In the first tableau, the article discusses the question of the cultural value of a hand-drawn map by reviewing the U.S. Supreme Court’s nineteenth century jurisprudence on Spanish-era *diseños*, or maps, which were part of Spanish and Mexican California land grants. In the second tableau, the article discusses the question of whether aesthetics is a proper domain of the law of cities by comparing the U.S. Supreme Court’s decision in *Berman v. Parker*<sup>4</sup> and its progeny with Daniel Burnham’s 1909 *Plan of Chicago* (the “*Plan*”),<sup>5</sup> which was the first, and perhaps most

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3. Such a conception of cities is consistent with approaches to regional planning. For a visual representation of this approach, see, for example, Patrick Geddes, *The Valley Section*, SIR PATRICK GEDDES MEMORIAL TR., <http://www.patrickgeddestrust.co.uk/valleysection.htm> (last visited Oct. 9, 2012).

4. 348 U.S. 26 (1954).

5. DANIEL H. BURNHAM & EDWARD H. BENNETT, *PLAN OF CHICAGO: PREPARED UNDER THE DIRECTION OF THE COMMERCIAL CLUB DURING THE YEARS MCMVI, MCMVII, AND MCMVIII* (Charles Moore ed., 1908) [hereinafter *PLAN OF CHICAGO*].

important, comprehensive plan drafted for an American city in the “City Beautiful” tradition. The third tableau explores the production of space and the philosophy of Henri Lefebvre in the context of the visual as law, most notably, in the rise of visual zoning and building codes. The fourth tableau extends the law and literature movement to the visual arts through the philosophy of Edward Casey as applied to the work of painter Edward Hopper. Allied with the presentations of the third and fourth tableaux are questions of how legal and visual abstractions relate to and affect the individual.

Like works of art that envelop their viewers, such as the medieval unicorn tapestries,<sup>6</sup> a chapel of Rothkos,<sup>7</sup> or a courthouse lobby of Ellsworth Kelly color-field paintings,<sup>8</sup> these four tableaux seek to illustrate for the reader how the law of cities is deeply intertwined with the visual, and how its evolution and the fulfillment of its role in building cities is also inextricably intertwined with the visual. The article concludes by offering a forward-looking approach to the visual in the law of cities.

## II. The Canvas: Distrusting, Embracing the Visual

*“The best way to understand a legal concept is to analyze it the way a geologist looks at the landscape.”*<sup>9</sup>—Gerald Frug

For the last several hundred years, the most recognizable legal image has been that of Justitia, a blindfolded woman

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6. See *The Unicorn Tapestries*, METRO. MUSEUM OF ART, <http://www.metmuseum.org/metmedia/interactives/adults-teachers/the-unicorn-tapestries> (last visited Oct. 9, 2012) (describing series of seven tapestries hung together in the round and dating from 1495–1505 that collectively show hunt of unicorn).

7. See *About the Chapel*, ROTHKO CHAPEL, [http://www.rothkochapel.org/index.php?option=com\\_content&view=article&id=3&Itemid=31](http://www.rothkochapel.org/index.php?option=com_content&view=article&id=3&Itemid=31) (last visited Oct. 9, 2012) (describing a Houston, Texas chapel built in 1961 hanging multiple Marc Rothko paintings in the round).

8. See *The Boston Panels*, U. S. GEN. SERVS. ADMIN., [http://www.gsa.gov/graphics/pbs/39\\_Ellsworth\\_Kelly.pdf](http://www.gsa.gov/graphics/pbs/39_Ellsworth_Kelly.pdf) (last visited Oct. 9, 2012) (describing 21 aluminum color-field paintings by artist Ellsworth Kelly hung in the round in Boston’s John Joseph Moakley U.S. Courthouse).

9. Gerald Frug, *A Legal History of Cities*, in *THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE* 154, 154 (Nicholas Blomley et al. eds., 2001).

carrying scales.<sup>10</sup> The image is intended to portray objectivity and impartiality. The implication, if only in metaphor, is that by purposefully restraining access to the visual, a tribunal is better served in objectively weighing the arguments of the parties before it. Of course, many of the other senses—hearing or touch, among them—are equally capable of conveying to an arbiter the identity or status of the person before the tribunal. As such, it is not simply the identity-masking nature of the blindfold that the metaphor seeks to implicate; rather, it is that the visual in its entirety is a sense not trusted with the legal enterprise.<sup>11</sup>

One commentator has noted:

Law, like most other disciplines or practices that aspire to rationality, has tended to identify that rationality (and hence its virtue) with texts rather than pictures, with reading words rather than “reading” pictures, to the point that it is often thought that thinking in words is the only

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10. Compare JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011), with ARLO GUTHRIE, *Alice's Restaurant Massacre, on ALICE'S RESTAURANT* (Reprise Records 1967). The song's protagonist and Obie, his friend, accused of throwing trash over a cliff,

stood up with the twenty seven eight-by-ten color, glossy pictures, and the judge walked in, sat down with a seeing eye dog, and he sat down; we sat down. Obie looked at the seeing eye dog, and then at the twenty seven eight-by-ten color, glossy pictures with circles and arrows and a paragraph on the back of each one, and looked at the seeing eye dog. And then at twenty seven eight-by-ten color, glossy pictures with circles and arrows and a paragraph on the back of each one and began to cry, 'cause Obie came to the realization that it was a typical case of American blind justice.

GUTHRIE, *supra*.

11. Taken literally, the metaphor clearly breaks down. A blindfolded judge would also be unable to review any written text, leaving the judge's only access to knowledge about a case ostensibly obtained through hearing. Hearing, of course, is equally prejudicial, if the judge knows the voices of the advocates or the parties on trial.

kind of thinking there is.<sup>12</sup>

Law's efforts to rid itself of the visual are not *sui generis*; rather, it follows a long tradition in the Western intellectual tradition that eschews the ability of the visual to adequately convey truth. Consider, for instance, challenges to the visual such as George Berkeley's "crooked oar" (is an oar that appears crooked when submerged half-way in the water truly bent?)<sup>13</sup> and modernist philosophers' discussions of color (when we agree we see "red," are we seeing the same thing?).<sup>14</sup>

Many who have considered the use of the visual in law have challenged the use of images in law, arguing that visual images are not subject to the same stringent form of interpretation as words, and that visual images are easily manipulated.<sup>15</sup> A commentator reviewing the use of visual media in U.S. Supreme Court decisions argues that the perceived "neutrality and accuracy" of visual attachments to decisions do not warrant "automatic deference."<sup>16</sup> For instance, a visual attachment in *Capitol Square Review and Advisory Board v. Pinette* was taken from a low angle, which made a ten-foot Latin cross appear substantially taller than it is.<sup>17</sup> Similarly, maps in redistricting cases can make districts appear more unusual than they might to voters in those districts.<sup>18</sup> As with any visual media, these attachments are

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12. Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 689 (2012) (quoting NEAL FEIGENSON & CHRISTINA SPIESEL, *LAW ON DISPLAY* 4 (2009)).

13. GEORGE BERKELEY, *THREE DIALOGUES BETWEEN HYLAS AND PHILONOUS* (1713), *reprinted in* THE WORKS OF GEORGE BERKELEY, BISHOP OF CLOYNE § 2:238 (A.A. Luce & T.E. Jessop eds. 1949); *see also* Lisa Downing, *George Berkeley*, STAN. ENCYC. OF PHIL. (Jan. 19, 2011), <http://plato.stanford.edu/archives/spr2011/entries/berkeley>.

14. *See* Barry Maund, *Color*, STAN. ENCYC. OF PHIL. (Sept. 18, 2006), <http://plato.stanford.edu/archives/fall2008/entries/color/> (describing history of debate on color arising with Descartes and Locke, and subsequent iterations of the debate).

15. Hampton Dellinger, *Words Are Enough: The Troublesome Use of Photographs, Maps, and Other Images in Supreme Court Opinions*, 110 HARV. L. REV. 1704, 1707 (1997).

16. *Id.*

17. 515 U.S. 753, 815 (1995) (Stevens, J., dissenting); Dellinger, *supra* note 15.

18. *See* Dellinger, *supra* note 15.

influenced by color, angle, size, perspective, and the choice of cropping that is always present in a visual representation.<sup>19</sup>

While the Court continues to use the visual in its decisions,<sup>20</sup> it is likely that such fears described above, not to mention tradition, encourage the Court to prioritize text-based descriptions over visual attachments. For instance, in the recent U.S. Supreme Court case of *PPL Montana, LLC v. Montana*,<sup>21</sup> Justice Kennedy's majority opinion utilized over 1,500 words and twenty-nine source citations to describe the course of three rivers at issue in the case, but utilized no maps whatsoever.<sup>22</sup> The State of Montana, in its briefing of the case, provided a detailed map that clearly denoted the course of the three rivers in a single image.<sup>23</sup> Interestingly, the dominant legal search engine, Westlaw, stripped the appended images from its HTML version of the State of Montana's briefing,<sup>24</sup> which implicates a more practical reason for not using the visual in legal decisions: technical issues with reproducing such images.

The visual raises other practical legal issues. For instance, Google recently settled litigation for its Book Search function with all of the text providers but determined that addressing the copyright of images would be too difficult, and so the images of such scanned books are being removed.<sup>25</sup>

Perhaps the best place to look for how the law addresses the visual is not the legal system's high court, but rather in the trial courts that do the dirty work of gathering evidence. There, the story of the visual is more complex. Prior to the 1850s, legal evidence usually consisted of words: spoken testimony, written depositions, contracts, deeds, and similar instruments.<sup>26</sup>

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19. *Id.*

20. *Id.* at 1705 (listing Supreme Court cases with images in their opinions).

21. 132 S. Ct. 1215 (2012).

22. *See id.* at 1221-25.

23. Brief for Respondent at Appendix 1a, *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012) (No. 10-218), 2010 WL 5126226.

24. *See id.* Westlaw's PDF version of the filing does display the maps, however.

25. Tushnet, *supra* note 12, at 685.

26. Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 YALE J.L. & HUMAN. 1, 5 (1998).

Images in court were usually those that were already authorized legal documents, such as county-approved maps, surveys in land dispute cases, or drawings and diagrams in patent cases.<sup>27</sup> As one commentator described it:

When unofficial drawings were used, they were not thought to be evidence. Only with the advent of photography were these broader kinds of visual representations conceptualized as evidence, their evidentiary value deemed significant enough to be fought over, their improper inclusion or exclusion deemed worthy grounds for appeal. Indeed, by the end of the century, the use of visual evidence had blossomed, and images of many sorts, from photographs to diagrams to three-dimensional models, were frequently used in an effort to persuade the jury. Visual representation, not limited to photography, had become a significant persuasive technique in the courtroom.<sup>28</sup>

Photographs opened the door to what came to be called “demonstrative evidence,” and in our current image-saturated culture, the strain of how to handle the increasing body of visual evidence is palpable.

In response to this strain, some commentators have argued that a new “visual legal realism” is needed, recognizing that “[a]s goes popular discourse, so goes legal rhetoric.”<sup>29</sup> Images have never been so easy and cheap to produce, and so easily distributed as they are today. If Marshal McLuhan was right, and the “medium is the message,”<sup>30</sup> these commentators argue, then the law must accept the ready prevalence of such images and its influence on the rhetoric of the day.<sup>31</sup> Already, the

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27. *Id.*

28. *Id.*

29. Richard K. Sherwin, *A Manifesto for Visual Legal Realism*, 40 LOY. L.A. L. REV. 719, 724 (2007).

30. See generally MARSHALL MCLUHAN, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* (1964).

31. See Richard K. Sherwin et. al, *Law in the Digital Age: How Visual*



practice of law itself, especially at the trial level, is saturated with images, and courtrooms don the latest technologies for electronic projection of visual evidence.<sup>32</sup> According to some commentators, the reason is obvious:

[R]adical shifts in the technology of communication alter our mind as well as our culture. For example, unlike words on the page, visual images on the screen are far more likely to directly stimulate heightened emotional responses. Viewers tend to react to screen images in the same way that they react to reality. Naive realism apparently is the natural default setting for visual common sense. Subject to our unthinking gaze, which is mostly how we watch, the screen seems to present a window onto reality. We tend to look through the medium rather than at it. Moreover, once we comprehend what we see, that's usually all we need to believe it. In other words, the familiar commonplace that "seeing is believing" is not just idle folk knowledge—not that there is anything "idle" about folk knowledge. Indeed, such knowledge is a major source not only of mental content but also of the cognitive tools most people use most of the time.<sup>33</sup>

This increasing use of the visual in the legal profession, even in its core judicial setting, will require more advanced thought on how the visual is used in the legal profession in a time when visual images proliferate, and are considered an expected part of discourse.<sup>34</sup> For purposes of this article, this

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*Communication Technologies are Transforming the Practice, Theory, and Teaching of Law*, 12 B.U. J. SCI. & TECH. L. 227, 241-45 (2006) (listing varieties of visual media used in courts and studies on effectiveness of visual communication).

32. Sherwin, *supra* note 29, at 727.

33. *Id.* at 725-26.

34. *Id.* at 731 (offering four "rules of thumb" for how to think about how the visual shapes legal decision-making: "(1) simplify the complex; (2) exploit the iconic; (3) emulate generic fictions (to produce the truth); and (4) respect

review of the visual in law generally provides the foundation from which to consider several instances of how the visual operates in the law of cities. Similar to law generally, the law of cities evinces a range of reactions to the visual, and the context in which the visual appears is as important as any bright-line rule.

### III. First Tableau: *Diseños* and the Value of a Hand-Drawn Map

*"It is not down in any map; true places never are."*<sup>35</sup>—Herman Melville

This tableau addresses the relationship between the visual and the law's overarching need for specificity, and how *diseños*, or maps, attached to Spanish California land grants express the cultural specificity of such requirements.

More than the law generally, the law of cities has embraced the visual. As noted previously, even when courts historically only took evidence in a textual form, they often made exceptions for maps and surveys that assisted the court in adjudicating a case involving land.<sup>36</sup> The law of cities' inclusion of the visual remains to this day. In many cities and counties, a zoning map is the legal means of delineating zoning district boundaries,<sup>37</sup> and where there is disagreement as to permitted uses between text in the zoning code or enabling ordinance and the zoning map, the zoning map generally controls.<sup>38</sup> For instance, in *Coastal Property Associates, Inc. v. Town of St. George*, the Supreme Judicial Court of Maine held that the zoning map's enabling ordinance "text is merely illustrative and was included to make it easier to locate the districts generally on the Map, and that one has to refer to the

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the medium").

35. HERMAN MELVILLE, *MOBY-DICK, OR, THE WHALE* 57 (Univ. of Cal. Press 1981) (1851).

36. Mnookin, *supra* note 26.

37. *See generally* 1 PATRICIA E. SALKIN, *AMERICAN LAW OF ZONING* § 9:3 (5th ed. 2012); 1 ARDEN H. RATHKOPF ET AL., *RATHKOPF'S THE LAW OF ZONING AND PLANNING* § 10:13 (4th ed. 2012) [hereinafter RATHKOPF].

38. *See generally* RATHKOPF, *supra* note 37.

Map itself to identify a district's precise borders."<sup>39</sup> It is the filing and acceptance of a subdivision map that legally subdivides a property into lots in most jurisdictions.<sup>40</sup> At common law, the act of filing for record a map of property showing lots separated by defined areas named as streets constitutes an offer to dedicate the street to public use.<sup>41</sup> Condominium plans requirements include a "description or survey map" showing monumentation, a three-dimension description of "sufficient detail" to identify the common areas and each separate interest.<sup>42</sup> Flood maps, created by the Federal Emergency Management Agency ("FEMA"), determine applicability of the federal government's flood insurance programs.<sup>43</sup> A condemning agency that draws a line delineating a potential future condemnation is liable for pre-condemnation damages where there is "unreasonable delay" in the condemnation.<sup>44</sup> In transfer of development rights schemes, it is the map that delineates the "sending" and "receiving" areas.<sup>45</sup>

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39. 601 A.2d 89, 90 (Me. 1992).

40. *See* *Cnty. of Los Angeles v. Hartford Accident & Indem. Co.*, 83 Cal. Rptr. 740, 742 (Ct. App. 1970) ("The recording of a final tract map for a normal subdivision automatically converts what was formerly a single parcel into as many separate lots as appear on the tract map."). *See generally* 9 HENRY D. MILLER & MARVIN B. STARR, *MILLER & STARR CALIFORNIA REAL ESTATE* § 25:61 (3d ed. 2012).

41. *See* *Wright v. City of Morro Bay*, 50 Cal. Rptr. 3d 719, 722 (Ct. App. 2006) (citing *S.F. Sulphur Co. v. Contra Costa Cnty.*, 276 P. 570, 372 (1929); *Eltinge v. Santos*, 152 P. 915, 917 (1915); *Niles v. City of Los Angeles*, 58 P. 190, 192 (1899)).

42. CAL. CIV. CODE § 1351(e) (West 2012).

43. *See* *Map Service Center*, FED. EMER. MGMT. AGENCY, <https://msc.fema.gov/webapp/wcs/stores/servlet/FemaWelcomeView?storeId=10001&catalogId=10001&langId=-1> (last visited Oct. 9, 2012).

44. *Klopping v. City of Whittier*, 500 P.2d 1345, 1356 (1972); *see also* 11 MILLER & STARR, *supra* note 40, § 30:19. These cases are highly fact dependent. For instance, in *Smith v. California*, 123 Cal. Rptr. 745 (Ct. App. 1975), the court held on other facts that it was not unreasonable to announce plans for a proposed freeway as far as 15 years in advance in view of the necessity for hearings, environmental studies, and the other required processes.

45. *E.g.*, BOULDER CNTY., COLO., LAND USE CODE § 6-700(b) (2011), *available* [at](http://www.bouldercounty.org/find/library/build/lucodearticle06.pdf) <http://www.bouldercounty.org/find/library/build/lucodearticle06.pdf> ("The sending sites to be preserved and protected through the application of this article are those designated on the Boulder County TDR Sending Sites Map,

While the law of cities accepts these visual documents into law, the question of how far to extend such limits with the visual varies over time, between communities, and even cultures. There may be no more evocative set of cases to illustrate how the most basic manner in which the visual can be culturally determined than those the U.S. Supreme Court faced when trying to determine the validity and perfection of Spanish and Mexican land claims in pre-conquest California.

The Spanish government controlled California prior to 1821.<sup>46</sup> The Mexican government controlled California from 1821 to 1846,<sup>47</sup> when it was seized and controlled by the United States<sup>48</sup> until the latter formally acquired 525,000 square miles of Mexican territory, including California, from Mexico in 1848 under the *Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico*,<sup>49</sup> commonly referred to as the *Treaty of Guadalupe Hidalgo* ("Treaty").<sup>50</sup> Under the Treaty, Mexico received fifteen million dollars in compensation for the territory.<sup>51</sup> Section Ten of the Treaty originally provided for protection of land grants previously made by the Spanish and Mexican governments; however, the U.S. Senate deleted that section before ratifying the Treaty, as many Americans believed that the land grants constituted the most valuable land in California.<sup>52</sup>

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the Niwot Sending and Receiving Area Map, and areas designated through Intergovernmental Agreements with municipalities in Boulder County.").

46. Myra K. Saunders, *California Legal History: A Review of Spanish and Mexican Legal Institutions*, 87 LAW LIBR. J. 487, 488 (1995).

47. *Id.*

48. *Id.*

49. Treaty of Peace, Friendship, Limits and Settlement with the Republic of Mexico, U.S.-Mex., Jul. 4, 1848, 9 Stat. 922, available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=009/llsl009.db&recNum=975>.

50. *Id.*

51. *Id.*

52. William Benemann, *Nine Treasures: California Legal History Research in the Bancroft Library, University of California, Berkeley*, 6 CAL. LEGAL HIST. 251, 258 (2011). All of the approximately 1,400 *diseños* filed under the California Land Act are now kept at the University of California, Berkeley's Bancroft Library. See *Calisphere*, UNIV. OF CAL., <http://www.calisphere.universityofcalifornia.edu/> (last visited Dec. 20, 2012) for copies of a substantial number of the *diseños*, which may be accessed by searching "diseno."

Seeking a middle-ground between expropriation of all claims and gaining access to the new state's riches, the U.S. Congress passed *An Act to Ascertain and Settle the Private Land Claims in the State of California* ("Act").<sup>53</sup> The Act was intended to adjudicate pre-existing property rights claims arising from the Spanish and Mexican governments in California, which totaled between twelve and thirteen million acres of prime coastal and valley land, most of which were intended to convince settlement of distant lands, and most of which operated as cattle *ranchos*.<sup>54</sup> The Act provided a review mechanism whereby any person claiming land grants from the Spanish or Mexican governments was to present a claim to an appointed board of commissioners who assembled all evidence of such claims.<sup>55</sup> If the commissioners verified a claim, the United States could appeal to the federal district court, and if the district court upheld the commissioners' ruling, the United States could appeal directly to the U.S. Supreme Court.<sup>56</sup> For land claims that were confirmed and survived appeal, the United States issued a patent<sup>57</sup> that established conclusive ownership between the United States and the claimants, but not as against third parties.<sup>58</sup> The Act provided claimants two years after the date of the Act to present claims to the commissioners for consideration; and that all other lands not so claimed would be "considered as part of the public domain of the United States."<sup>59</sup>

In review of such claims, the United States Supreme Court early announced in *U.S. v. Cambuston*<sup>60</sup> the requirements for perfecting a pre-existing Mexican land claim that would be recognized under the Act. These requirements included meeting all of the criteria for establishing a land grant under

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53. Ch. 41, 9 Stat. 631 (1851) [hereinafter California Land Act].

54. Karen B. Clay, *Property Rights and Institutions: Congress and the California Land Act of 1851*, 59 J. OF ECON. HIST. 122, 122-23 (1999).

55. California Land Act § 8, 9 Stat. at 632.

56. *Id.* §§ 9-10, 9 Stat. at 632-33.

57. *Id.* § 13, 9 Stat. at 633.

58. *Id.* § 15, 9 Stat. at 634.

59. *See* Beard v. Federy, 70 U.S. 478 (1865) (describing procedures under the California Land Act).

60. 61 U.S. (20 How.) 59 (1857).

Spanish or Mexican rule.<sup>61</sup> If the Mexican Governor decided to grant the land, the *diseño* was included in a document called an *expediente*, which granted title to the land in the *diseño*.<sup>62</sup>

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61. *Id.* at 62.

The regulations for the colonization of the Territories of the Government of Mexico, made 21st November, 1828, in pursuance of the act of the General Congress, August 18, 1824, provided: 1st. That the Governors of the Territories should be empowered to grant vacant lands, among others, to private persons who may ask for them, for the purpose of cultivating and inhabiting the same. 2d. That every person soliciting lands shall address to the Governor a petition, expressing his name, country, and religion, and describing as distinctly as possible, by means of a map [called a *diseño*], the land asked for. 3d. The Governor shall proceed to obtain the necessary information, whether the petition contains the proper conditions required by the law of the 18th August, 1824, both as regards the land and the petitioner, in order that the application may be at once attended to; or, if it be preferred, the municipal authority may be consulted, whether there be any objection to the making of the grant. 4th. This being done, the Governor will accede or not to such petition, in conformity to the laws on the subject. 5th. The definitive grant asked for being made, a document signed by the Governor shall be given, to serve as a title to the party interested, wherein it must be stated that the grant is made in exact conformity with the provisions of the law in virtue of which possession shall be given. 6th. The necessary record shall be kept, in a book provided for the purpose, of all the petitions presented and grants made, with maps of the lands granted, and a circumstantial report shall be forwarded quarterly to the Supreme Government.

*Id.*; see also *United States v. Castillero*, 67 U.S. (2 Black) 17 (1862) (describing same).

62. See *United States v. Galbraith*, 67 U.S. (2 Black) 394, 399 (1862) ("A *diseño* or map is a necessary part of every land *espediente* [sic], and is distinctly required by the regulations of 1828."). The Court was not always consistent in its understanding of what right the *expediente* granted. In *United States v. Elder*, 177 U.S. 104 (1900), the Court collected its partially contradictory holdings on the role of the *expediente*. The most technically precise definition of an *expediente* was in *United States v. Knight's Administrator*, 66 U.S. (1 Black) 227, 245-46 (1861), which stated,

When complete, an *espediente* [sic] usually consists of the petition, with the *diseño* annexed; a marginal decree, approving the petition; the order of reference to the proper

*Diseños* were typically hand-drawn, and sketched out the land grant in reference to mountains, rivers, beaches, and other natural monuments. The *diseño* was rarely surveyed, and where it was, the Spanish and Mexican method for doing so could not yield a replicable result. Tradition called for two men on horseback to:

[T]ake a lariat that was fifty *varas* in length (about 137.5 feet). One man would begin at a stated landmark - the old oak tree at the edge of the dry creek, the big red rock at the top of the third hill - and drive in a stake. The second horseman would ride until the lariat was drawn tight, and drive in another stake. The procedure would then be repeated. If the lariat was drawn through wet grass, it might be stretched and lengthened, or on a hot day, dried and contracted. As a result, no two surveys of the same area ever matched, and descriptions of the land were frequently so vague that it was not clear what should be measured in the first place.<sup>63</sup>

While the lariat and the *diseño* were sufficient to claim land under the Mexican regime, both means of surveying property looked amateurish, even silly, to the American court. By the time the *diseño* cases landed before the Supreme Court, the United States had nearly three-quarters of a century invested in a technical system for surveying and conveying

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officer, for information; the report of that officer, in conformity to the order, the decree of concession, and the copy or a duplicate of the grant. These several papers-that is, the petition, with the *diseño* annexed, the order of reference, the *informé*, the decree of concession, and the copy of the grant, appended together in the order mentioned-constitute a complete *expediente* [sic], within the meaning of the Mexican law.

*Id.* Note that an "*expediente*" was also sometimes referred to in the Court's cases as an "*espediente*," which refers to the same document.

63. Benemann, *supra* note 52, at 259.

land. While the Mexican government gave away lands in California subject to privately drawn *diseños*, the American system called for surveying land *prior* to settlement,<sup>64</sup> and all sales or dispositions of public lands to private parties by the federal government were to be conducted in accordance with that survey system.<sup>65</sup> The Public Land Survey System ("PLSS"), which is currently in use in most states with the exclusion of the original thirteen colony states and Texas, was originally proposed by Thomas Jefferson.<sup>66</sup> The Land Ordinance of 1785<sup>67</sup> provided for the systematic survey of public domain lands and the Northwest Ordinance of 1787<sup>68</sup> established a rectangular survey system. The resulting PLSS system divided land into six-mile-square townships, each of which are subdivided into thirty-six one-mile-square sections. Sections, in turn, can be further subdivided into quarter sections, quarter-quarter sections, or irregular government lots. The survey system is maintained through placement of a series of markers called "monumentation."<sup>69</sup>

Mexican claimants seeking to validate California land grants with hand drawn *diseños* were met with skepticism of the courts of their conquerors more accustomed to such technical surveys. While the American courts ostensibly gave the same weight to the validity of the *diseños* as the Mexican Governor would have done, it is clear the U.S. Supreme Court found this difficult to do in over seventy cases the Court heard

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64. *The Public Land Survey System (PLSS)*, NAT'L ATLAS OF THE U.S., U.S. DEPT OF THE INTERIOR, [http://www.nationalatlas.gov/articles/boundaries/a\\_plss.html](http://www.nationalatlas.gov/articles/boundaries/a_plss.html) (last visited Oct. 9, 2012) [hereinafter *Public Land Survey System*].

65. *Id.*

66. *Id.*

67. *An Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territory* (May 18, 1785), in 29 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789 923 (Worthington C. Ford et al. eds., 1933), available at <http://memory.loc.gov/cgi-bin/query/r?ammem/bdsdcc:@field%28DOCID+@lit%28bdsdcc13201%29%29>.

68. *An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio* (July 13, 1787), in 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789 334-43 (Worthington C. Ford et al. eds., 1936), available at <http://memory.loc.gov/cgi-bin/query/r?ammem/bdsdcc:@field%28DOCID+@lit%28bdsdcc22501%29%29>.

69. *Public Land Survey System*, *supra* note 64.



involving *diseños*. For instance, in *De Arguello v. United States*,<sup>70</sup> a case adjudicating a *diseño* that claimed most of the San Francisco peninsula for the descendants of a commander of the San Francisco presidio, the Court refused to defer to the *diseño*.<sup>71</sup> (See Figure 1). The Court expressed its frustration, stating, “[t]he appellants [who were challenging the *diseño* and the land claim] have got Las Pulgas,” the subject of the *diseño*, “by a valid title, according to the boundaries ascertained by the proper public authorities, and cannot now be permitted to recur to vague tradition of a vague and uncertain boundary, to unsettle the titles to a large territory since granted to others.”<sup>72</sup> In other words, the Court ruled for the party whose claim was established within the Court’s own cultural surveying scheme. To the eye of the Court, the hand-drawn *diseño*, with its sketched references to mountains, rivers, and beaches, was no match for the rigor of the more precise American survey system.<sup>73</sup>

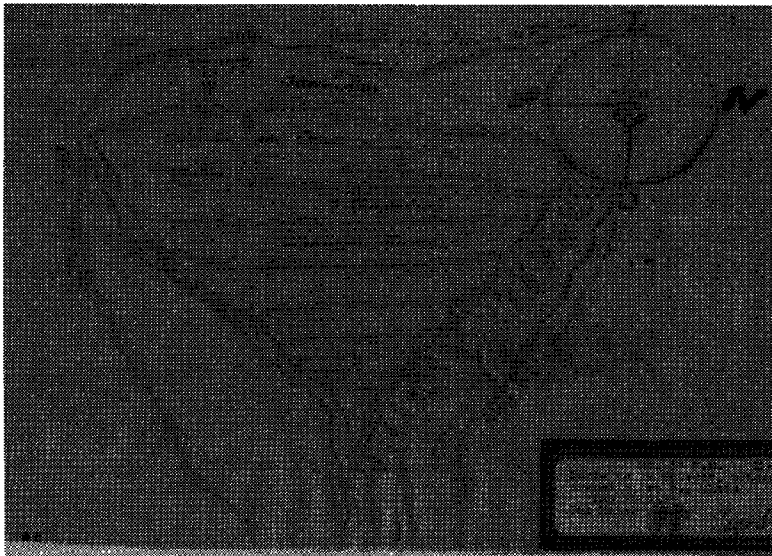


Figure 1. *Diseño del Las Pulgas*<sup>74</sup>

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70. 59 U.S. (18 How.) 539 (1855).

71. *See id.* at 546.

72. *Id.*

73. *Id.*

74. *Calisphere*, UNIV. OF CAL.,  
[http://content.cdlib.org/ark:/13030/hb3t1nb14h/?query=Rancho de las](http://content.cdlib.org/ark:/13030/hb3t1nb14h/?query=Rancho%20de%20las) (last

The *diseño* casts into stark relief the stakes at issue in cultural relations to the visual in the law of cities: a map sufficient to convey vast swaths of coastal California in Mexican California conveyed no legal rights before an American court accustomed to a technically-accurate and scientifically-reproducible legal description. On the basis of ambiguity in a hand-drawn map, the Supreme Court dispensed with land claims to much of what became California's most prosperous areas. This exhibits one way in which the cultural relationship to the visual in the law of cities manifests itself: while a map can be useful as a means of conveying land between parties, the value of the map is subject not only to the constitutional and statutory constraints upon such maps, but also the cultural and customary constraints upon what a map must do. While the rule of law typically prevents constitutional or statutory changes from eliminating legal rights provided by maps, larger cultural or customary changes, whether resulting from revolution, war, or otherwise, can upend the norms of how visual legal documents are interpreted and thus convey rights.

#### IV. Second Tableau: Aesthetics and Burnham's 1909 *Plan of Chicago*

This tableau explores the changing relationship between the aesthetics, or the beauty of the built environment, and the law of cities. At the heart of this issue lies two questions: first, the extent to which law ought to regulate development to achieve a perceived beauty; and second, whether implicit in regulating beauty is a policy favoring the common good, property values, an elitist gentility, business, racism, all of the above, or something more?

The English legal system had to tackle these aesthetic questions, eventually embedding them in the American legal inheritance. One prominent example is the role of enclosure laws in England and the accompanying rise of the picturesque as an artistic movement. In England, beginning in the sixteenth century and through to the nineteenth century, a series of enclosure laws eliminated rural commons areas,

typically used for grazing or growing hay, and instead “enclosed” them in private property estates owned by elites and maintained after enclosure solely for the private uses of those elites.<sup>75</sup>

The landscape architect Humphry Repton was particularly skilled at using the enclosure acts to achieve the ideal of the “picturesque” in landscape design.<sup>76</sup> Repton, and others, in seeking to render the picturesque upon the land, sought to recreate within the newly enclosed estate the “natural” landscape of the commons that previously existed. The result was an effort to maintain, through the artifice of the picturesque, the visual imagery of the previously open commons, but within the regularized, and private, spaces of the estate.<sup>77</sup> In this application, the picturesque helped to mask—at least to the elites and perhaps to the society at large—the underlying legal changes under way in the countryside. The artifice did so by recreating the feeling previously elicited by the commons and thus normalizing the dramatic assertion of rights over rural land by the elites.

In twentieth-century American culture, aesthetics in the law of cities evolved along several lines, including such disparate subjects as billboard regulation, project design review, and historic preservation.<sup>78</sup> This article focuses on a

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75. See generally John Macarthur, *Visual Appropriation and Property in the Theory of Humphry Repton*, in *THE GEOGRAPHY OF LAW: LANDSCAPE, IDENTITY AND REGULATION* 49, 49-65 (William Taylor ed., 2006).

76. See *id.* at 50.

77. Simon Ryan, *Picturesque Visions*, in *THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE*, *supra* note 9, at 143, 143.

78. See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978).

Because this Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city appellants do not contest that New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal.

*Id.* (citations omitted); Highway Beautification Act of 1965, 23 U.S.C. § 131 (2012) (controls outdoor advertising along 306,000 miles of Federal-Aid

series of questions that center around whether a city may raze a section of town deemed undesirable or, in the parlance of mid-century redevelopment, “blighted.” Is removal of a community whose primary offense is its visual appearance a legitimate concern of the law of cities?<sup>79</sup>

In this case, we will start with the answer, because it is so prominent in the evolution of the law of cities. Like many mid-century cities, the District of Columbia sought to condemn and raze a largely African-American community that it deemed “blighted”<sup>80</sup> in order to build a new community that, it turned out, would become largely inhabited by white residents.<sup>81</sup> The District of Columbia did have evidence of physical deterioration—a number of the buildings lacked indoor toilets, and there were a number of other indices of poverty—but there were also plenty other buildings in the wrecking ball’s way that were home to upstanding and profitable businesses.<sup>82</sup> Just such a business was the source of review in the 1954 U.S. Supreme Court case of *Berman v. Parker*.<sup>83</sup> In that case, the Court held that the District of Columbia could use its eminent domain powers to condemn not only the dilapidated properties, but also those well-functioning buildings in proximity to the blighted area.<sup>84</sup> Further, the Court held:

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Primary, Interstate and National Highway System roads).

79. Admittedly, blight determinations technically turned on non-visual determinations. However, the rationale for blight determinations is often a formality by which to grade how a place looks to those who do not live there.

80. *Berman v. Parker*, 348 U.S. 26, 34 (1954).

81. Amy Lavine, *Urban Renewal and the Story of Berman v. Parker*, 42 URB. LAW. 423, 467 (2010).

82. See *Berman*, 348 U.S. at 30-31; Lavine, *supra* note 81, at 444.

Out of the entire 550 acre area, 43% of the residences had only outhouses, 44% did not have showers or baths, 70% had no central heating, and 21% did not have electricity. But while its physical attributes may have been lacking, Southwest was home to about 23,000 residents, and it provided a lively cultural hub for many of the city’s black residents and immigrant Jews.

Lavine, *supra* note 81, at 444.

83. See *Berman*, 348 U.S. at 31.

84. See *id.* at 34-35.

The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.<sup>85</sup>

The idea that the public welfare, and moreover the police power, includes within it the potential for aesthetic regulation was buttressed by subsequent decisions of the Court. For instance, in *Village of Belle Terre v. Boraas*,<sup>86</sup> the Court noted:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.<sup>87</sup>

In *City of Memphis v. Greene*,<sup>88</sup> the Court noted, "[t]he residential interest in comparative tranquility is also

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85. *Id.* at 33 (citations omitted).

86. 416 U.S. 1 (1974) (affirming an ordinance limiting single-family dwellings to families of not more than two unrelated residents).

87. *Id.* at 9.

88. *City of Memphis v. Greene*, 451 U.S. 100 (1981).

unquestionably legitimate. That interest provides support . . . for the accepted view that a man's home is his castle."<sup>89</sup> Through these and other cases, the Court established that aesthetics was within the ambit of police power regulations and a proper subject for condemnation.

With the clarity of the contemporary approach to aesthetics established, it is worth returning to perhaps the most important planning document of the twentieth century to address aesthetics, the 1909 *Plan*<sup>90</sup> prepared for an organization of private city boosters, The Commercial Club, by Daniel Burnham of "make no little plans" fame,<sup>91</sup> and architect Edward Bennet. Perhaps more than any other American document before or after, the *Plan* was intent on finding a way to build a beautiful city. In fact, the movement it launched across the United States was often referred to by the moniker "City Beautiful," with its impetus to civic leaders, as well as businesses and other private parties, to do their parts to beautify American cities.<sup>92</sup>

The concept of city planning was in its infancy when the *Plan* was set forth; the City of Chicago had no planning department or staff, and the document itself tells us that plan was the result of "disinterested men of wide experience," most of which were leaders in the business community, and was drafted over thirty months.<sup>93</sup> The City Beautiful movement, which became closely allied to both the *Plan* and Burnham personally, stated a "prosperity gospel"<sup>94</sup> for bringing aesthetics—beauty—to city form. Burnham wrote:

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89. *Id.* at 127.

90. *PLAN OF CHICAGO*, *supra* note 5.

91. It is arguable whether Burnham ever actually uttered the words for which he is posthumously famous. See THOMAS S. HINES, *BURNHAM OF CHICAGO: ARCHITECT AND PLANNER* 401 n.8 (2d ed. 2009) (1974).

92. *PLAN OF CHICAGO*, *supra* note 5, at 8.

93. *PLAN OF CHICAGO*, *supra* note 5, at 2.

94. The idea largely holds that God blesses those favored with material wealth. Compare Cathleen Falsani, *The Prosperity Gospel*, WASH. POST, <http://www.washingtonpost.com/wp-srv/special/opinions/outlook/worst-ideas/prosperity-gospel.html> (last visited Oct. 22, 2012), with *PLAN OF CHICAGO*, *supra* note 5, at 4 ("[T]he city has a dignity to be maintained; and good order is essential to material advancement.").

The experience of other cities both ancient and modern, both abroad and at home, teaches Chicago that the way to true greatness and continued prosperity lies in making the city convenient and healthful for the ever-increasing numbers of its citizens; that civic beauty satisfies a craving of human nature so deep and so compelling that people will travel far to find and enjoy it; that the orderly arrangement of the fine buildings and monuments brings fame and wealth to the city; and that the cities which truly exercise dominion rule by reason of their appeal to the higher emotions of the human mind. The problem for Chicago, therefore, resolves itself into making the best use of a situation, the central location and resources of which have already drawn together millions of people, and are clearly destined to assemble many times that number; and planning for that civic development which promotes present content and insures permanence.<sup>95</sup>

As part of the aesthetic vision, Burnham spoke of the *Plan* as treating the city with a "comprehensive plan" that would address the city as an "organic whole," a concept then new to American cities.<sup>96</sup> The *Plan* states several factors that convinced these private civic leaders that they had to engage the idea of city planning.<sup>97</sup> To achieve its goals, the proposal

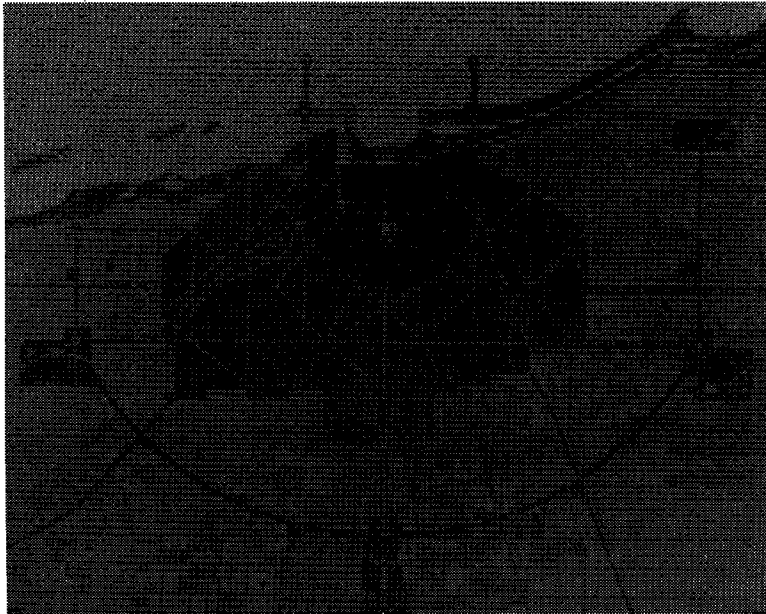
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95. PLAN OF CHICAGO, *supra* note 5, at 30.

96. *Id.* at 28-29; *see also id.* at 121 (providing for visions of the improvement of the Lake front; the creation of a system of highways outside the city; the improvement of railway terminals, and the development of a complete traction system for both freight and passengers; the acquisition of an outer park system, and of parkway circuits; the systematic arrangement of the streets and avenues within the city, in order to facilitate the movement to and from the business district; and the development of centers of intellectual life and of civic administration, so related as to give coherence and unity to the city.).

97. *Id.* at 14 (noting that "city planning, in the sense of regarding the city as an organic whole and of developing its various units with reference to their relations one to another," had its origins in Paris and that Paris was the most accomplished in this art).

called for a wide array of public infrastructure projects, but perhaps none was as dramatic as an effort to cut through the city's existing street forms and build large boulevards reminiscent of what Haussmann had accomplished in Paris, and which had been widely emulated in European cities.<sup>98</sup> (See Figure 2).



*Figure 2. Plan of Chicago*<sup>99</sup>

The *Plan* was heavily influenced by Haussmann's work in Paris, noting that "[t]he task which Haussmann accomplished for Paris corresponds with the work which must be done for Chicago, in order to overcome the intolerable conditions which invariably arise from a rapid growth of population."<sup>100</sup> If Haussmann could take Paris's medieval core and turn it into a home for grand boulevards, then such plans were not beyond the reach of a can-do city like Chicago.

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98. *Id.* at 11-18.

99. PLAN OF CHICAGO, *supra* note 5, at 93.

100. *Id.* at 18.



Similarly, the origins of the *Plan* could be traced to other standard bearers of civic beauty at the time. The *Plan* states that its origins "can be traced directly to the World's Columbian Exposition" held in 1893,<sup>101</sup> which brought to the city, if only in plaster-of-Paris casts, a vision and scale of grandeur that the post-fire Chicago of the late nineteenth-century had not imagined possible.

In addition, the city was facing staggering growth—during the second half of the nineteenth century, the population of Chicago increased from thirty thousand to two million<sup>102</sup>—and a grand plan seemed essential for practical purposes. That growth also led business leaders of Chicago to feel an air of inevitability about the city's destiny for greatness. It was not good enough that the city should be wealthy, but they now also sought it to have the prestige of a world-class city.<sup>103</sup> The *Plan* notes that the area of the Middle West that is the "domain over which Chicago holds primacy is larger than Austria-Hungary, or Germany or France,"<sup>104</sup> and that expectations were such that in fifty years the city's population will "be larger than London: that is, larger than any existing city."<sup>105</sup> To secure the city's prominence befitting its size, the *Plan* implores the City's business leaders that:

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101. *Id.* at 4.

102. *Id.* at 32.

103. *See, e.g., id.* at 34.

It is not in the spirit of boasting that these facts are stated, but rather to show the responsibility which the very pre-eminence of the city imposes, and the necessity for establishing and maintaining those standards of commercial integrity, of taste, and of knowledge which are the prerequisites of lasting success, and the only real satisfaction of the human mind. The constant struggle of civilization is to know and to attain the highest good; and the city which brings about the best conditions of life becomes the most prosperous.

*Id.*

104. *Id.* at 32.

105. *Id.* at 33.

Conditions in Chicago are such as to repel outsiders and drive away those who are free to go. The cream of our own earnings should be spent here, while the city should become a magnet, drawing to us those who wish to enjoy life. The change would mean prosperity, effective, certain, and forever continuous."<sup>106</sup>

What was needed was something to draw those people to the City and that was a beautiful city.

As much as the *Plan* was a visionary document, it was also practical. Foremost among the practical considerations were legal questions about how, under the American legal system, Chicago could build grand boulevards like Haussmann's Paris, a feat which had been accomplished under the power of an emperor. Behind the eye-catching visual renderings of the Chicago that could be, the *Plan* also provided a detailed legal analysis of the powers necessary to bring the *Plan* to fruition.<sup>107</sup> Walter F. Fisher, who later became U.S. Secretary of the Interior, drafted the legal analysis,<sup>108</sup> which addressed in great detail the legal question of aesthetics. If a city were to make itself beautiful, and if that beauty required cutting through the fabric of the city as in Haussmann's Paris, it would also mean condemning neighborhoods functioning fine now, but which were not in line with the larger, city-wide plan. With regard to condemnation to achieve the purposes of the *Plan*, Fisher noted:

The police power is adequate to the destruction, without recompense, of single buildings which are insanitary or unsafe, but the legislature of Illinois has not yet undertaken to go further and license the condemnation by municipal authorities of congested or unwholesome areas under the power of eminent domain. . . .

. . . It may be doubted, however, whether the

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106. *Id.* at 124.

107. *See generally id.* at 125-54.

108. *Id.* at 126.

courts would sustain as constitutional a statute designed to appropriate a whole congested area merely for the purpose of renovating it.<sup>109</sup>

Fisher's analysis, of course, came almost fifty years prior to *Berman*, and in considering almost identical factual situations, Fisher concluded that the law of aesthetics in his time did not clearly permit the wholesale removal of a community, the very such action approved in *Berman*.<sup>110</sup> Now, a century later, and after *Kelo v. City of New London*,<sup>111</sup> which affirmed *Berman*'s broad interpretation of the police power,<sup>112</sup> it is remarkable to read such timidity toward aesthetic regulation in a document that is the basis of the City Beautiful movement.

It must be remembered, however, that the *Plan* was written during a time that pre-dated most of the twentieth-century planning apparatus—the *Plan* was more than a decade prior to the U.S. Supreme Court's blessing of zoning in the 1925 case of *Village of Euclid v. Ambler Realty Company*<sup>113</sup> or the widespread adoption of Zoning Enabling Acts in the 1920s.<sup>114</sup> In fact, the legal analysis in the *Plan* states that it is unclear whether typical zoning requirements, much less design review requirements typical today, would be permitted at the time of the *Plan*:

No question is made but that the city council has power to regulate the height of buildings with a view to health and public safety; but it may be doubted whether the police power would justify

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109. *Id.* at 151.

110. *See supra* text accompanying notes 84-85.

111. 545 U.S. 469 (2005).

112. *Id.* at 501.

113. 272 U.S. 365 (1926).

114. For a historical background of such acts see Stuart Meck, *Model Planning and Zoning Legislation: A Short History*, in 1 AM. PLAN. ASS'N, MODERNIZING STATE PLANNING STATUTES: THE GROWING SMART WORKING PAPERS, 1, 1-4 (1996), available at <http://www.planning.org/growingsmart/pdf/PAS462.pdf>; and Ruth Knack et al., *The Real Story Behind the Standard Planning and Zoning Acts of the 1920s*, 48 LAND USE L. & ZONING DIG. 3 (1996), available at <http://www.planning.org/growingsmart/pdf/LULZDFeb96.pdf>.

the municipal authorities in imposing more rigorous restrictions upon the character of buildings to be constructed along boulevards and around parks than in other parts of the city.<sup>115</sup>

This passage of the *Plan* shows that its authors felt uncertain whether land use controls common today, such as those exercised by many design review boards over facades, could be legally sustained. The *Plan's* legal reasoning on aesthetics is, in other words, as far as we can imagine from the post-*Berman*, and post-*Kelo*, reality where aesthetic regulations proliferate not only over the facades of buildings, but of transient structures like billboards. In its time, though, the *Plan's* legal statement was merely a statement of the existing law. In this way, the *Plan* and *Berman* operate as bookends for a time when the law of cities was evolving in its approach to the regulation of beauty.

If the *Plan* was one of America's first planning document to prominently align itself with the import of making a city beautiful, it also exhibited a hesitancy, even a restraint, in its legal case for a city's ability to engage in the type of activity it sought to engender. By the time of *Berman*, however, the Court was not only willing to offer a resounding legal defense of aesthetic regulation, but also willing to offer a defense to a city's power to condemn functioning buildings in neighborhoods that were blighted.<sup>116</sup> In just four decades, the law evolved to accept that building and protecting beautiful cities was a proper use of governmental power, even in democracies.

Unresolved in the question of aesthetics regulation are the social implications of beautiful cities. While the *Plan* and the City Beautiful-era projects led to some of the most beloved public works projects in American history,<sup>117</sup> post-*Berman* redevelopment projects led to innumerable examples of failed modernist buildings, bleak plazas, and disruptive street patterns.<sup>118</sup> Aesthetic regulation, in other words, always has a

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115. PLAN OF CHICAGO, *supra* note 5, at 141.

116. See *supra* text accompanying notes 84-85.

117. Examples of such projects include Chicago's Michigan Avenue, Philadelphia's Museum of Art, and San Francisco's Civic Center.

118. Examples of such projects include Albany's Empire State Plaza,

social cost to those in the way of progress, but the result of aesthetic regulation is not always beauty. And thus the regulation of aesthetics through law establishes itself as something other than a philosophical inquiry into beauty's origins and tastes. Instead, aesthetics in law has become first a tool to destructive power, and only with great labor does it create a city beautiful to both its inhabitants and creators.

#### V. Third Tableau: Production of Space and Visual Codes

*"The user's space is lived—not represented (or conceived)."*<sup>119</sup>

—Henri Lefebvre

This tableau explores a more theoretical approach to the law of cities and the visual: whether visual legal codes, such as those used in San Francisco's new Treasure Island development plans, can answer a long-standing need of the law of cities to prioritize the perspective of the individual in the production of space.

The legal codes that define the way cities evolve are bound by the intellectual traditions in which they arose. For Richard Sennett, these codes exist within a crossfire between the "Christian city," which "put great value on the inside—on shelter within buildings as on inner experiences," and the "Enlightenment city," which "sought to take people outside—but on to fields and forests rather than streets filled with jostling crowds."<sup>120</sup> Sennett defines the issue with this ideological division:

In the face of larger differences in the city they tend to withdraw to the local, intimate, communal scale. Those who work visually and at a larger scale find it as difficult to organize diverse urban scenes. . . . The modern planner

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San Francisco's Western Addition, and Fort Worth's Tarrant County Convention Center.

119. HENRI LEFEBVRE, *THE PRODUCTION OF SPACE* 362 (Donald Nicholson-Smith trans., 1991) (1974).

120. SENNETT, *supra* note 1, at 97.

lacks visual precepts for how races might be mixed in public places, or how to orchestrate the zoning and design of streets so that economically mixed uses work well. It is equally obscure how to design house projects and schools that mix races, classes, or ages. Human diversity seems something beyond the powers of human design.<sup>121</sup>

For Sennett, the problem with the existing planning state is that its tools, such as traditional zoning, are ill-equipped to address or build a city with economic or racial diversity. Others have seen the dilemma of abstraction in codes planning for cities as inherent in the modern approach to law itself. Some have argued that the Western legal project is underwritten by an organized forgetting of the spaces and places of social life.<sup>122</sup> For such commentators, the English common law crafted by early modernists such as Edward Coke sought to create a unitary legal structure that, in its wake, denied and subjugated local laws that, in turn, reflected local communities.<sup>123</sup> Another commentator noted that:

When Blackstone instructed the teacher of English law to consider his course as “a general map of the law, marking out the shape of the country, its connexions and boundaries, its greater divisions and principal cities,” he also counseled that “it is not his business to describe minutely the subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet.” In so doing, he neatly expressed the tendency of law to erase spatial specificity and local difference in the name of an ordered and apparently coherent unity. In its very constitution, then, law appears to have an

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121. *Id.* at 97-98.

122. Nicholas Blomley, *From “What?” to “So What?”: Law and Geography in Retrospect*, in 5 *LAW AND GEOGRAPHY: CURRENT LEGAL ISSUES* 19, 25 (Jane Holder & Carolyn Harrison eds., 2003).

123. *Id.*

important, if negative, relation to space.<sup>124</sup>

This underlying abstraction of modern law has significant ramifications for the law of cities, for if the creation of modern law has subjugated the specific to the general, then any effort in the law of cities to plan for a specific neighborhood or community must offer an alternative narrative to that of Coke and Blackstone.

One approach to the local's argument for place-based law arises in the law and geography movement. For instance, Nick Johnson and John Wightman have argued that the "where" of law is relevant in two ways: the "nexus between spatial location and the relevant persons is established in the law" and "where location can be seen to affect the content of the legal rights and duties."<sup>125</sup> In addition, they argue that there are three features of land that distinguish it from other things in which law recognizes property rights: (i) land remains, although structures on the land may be removed or replaced; (ii) the supply of land is fixed; and (iii) land is fixed in place, and thus "all land stands in a permanent spatial relationship to all other land."<sup>126</sup> The permanence and fixed supply of land impose a "stuckness" on the property owner, for while there is ostensibly a market for land, individuals are "stuck" to individual parcels to the extent they have invested financially in a business or residence, or to the extent that "rootedness" has developed in relationships to neighbors or networks of suppliers.<sup>127</sup> It is these non-legal attachments that create "stuckness" as much as the law itself.<sup>128</sup> In acknowledgment of this "stuckness," the legal geographies movement seeks to open again the door, closed to local laws built on local knowledge, shut so long ago.<sup>129</sup> Doing so "has the capacity to release law

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124. *Id.*

125. Nick Johnson & John Wightman, *Spatial Dimensions of Private Law*, in 5 LAW AND GEOGRAPHY: CURRENT LEGAL ISSUES, *supra* note 122, at 35, 36.

126. *See id.* at 49.

127. *See id.*

128. *Id.*

129. *See* Jane Holder & Carolyn Harrison, *Connecting Law and Geography*, in 5 LAW AND GEOGRAPHY: CURRENT LEGAL ISSUES, *supra* note 122, at 3, 3 ("Context is everything. The conviction that law can properly be

from its (imposed and self-imposed) confinement as 'word' (interpretation, meaning, discourse) and to show 'the legal at work in the world,' a world dominated by the physical (places, landscapes, spatialities, natures)."<sup>130</sup>

But perhaps no one has examined the question of how the abstractions of law affect the planning of cities more than the French philosopher Henri Lefebvre. Abstractions of law, to Lefebvre, are the tools that permit the creation of abstract spaces, spaces that deny an integrity to the local. Of such abstract space, Lefebvre has written, similar to Sennett, that it is a "tool of domination" that

asphyxiates whatever is conceived within it and then strives to emerge. . . . This space is a lethal one which destroys the historical conditions that gave rise to it, its own (internal) differences, and any such differences that show signs of developing, in order to impose an abstract homogeneity.<sup>131</sup>

Legal abstractions stifle not only diversity, but also the individual's ability to be recognized in the planning process.

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understood only be reference to its place in, and relationship to, social, economic, political, and ecological systems underpins contemporary critical and socio-legal scholarship."); *id.* at 4 ("[W]hereas the abstract application of legal doctrine and principles, and even the wholesale transplantation of a legal regime, might be viewed as unproblematic from a positivist perspective, a 'Geography in Law' approach suggest that law must make room for local conditions and experience, and recognize the changing of laws to work in local contexts. The identification here is with 'local legal universes,' or 'legal localization'—forms of regulation rooted in local conditions of existence.").

130. *Id.* at 5; *see also id.* at 6 ("If space is a dominant currency of geography, then the boundaries of space are all-important, particularly when created or reinforced, by the concepts of law, such as jurisdiction, territory, and legality."); Robert Mohr, *Territory, Landscape and Law in Three Images of the Basque Country*, in *THE GEOGRAPHY OF LAW: LANDSCAPE, IDENTITY AND REGULATION*, *supra* note 75, at 17, 29, *available at* <http://works.bepress.com/rmohr/1/> ("Boundaries and how we draw them are fundamental to law and to a definition of law as jurisdiction. This analysis reminds us that those boundaries can be contested or refused, and may be unclear and overlapping. The boundaries can be seen to be less important than the spaces they purport to contain.").

131. LEFEBVRE, *supra* note 119, at 370.



The zoning map, for instance, uses perfect rationality to divide the city into a hierarchy of zones and uses without any perceived recognition of what exists in a place, or the individual's desires for that place.

This rise of abstract space, and abstraction's laws, and its purpose, have a history<sup>132</sup> that Lefebvre traces, in their European context, to codes that evolved out of the colloquial building styles of towns, each of which developed its own style of architecture.<sup>133</sup> Imagine the small European town, where each house has its own name, perhaps a place like Queen Camel in the Somerset region of England, where instead of numbers, homes have names, such as "Caburn." However, these local architectural codes were ultimately subsumed into larger, national codes, which stripped the locality of its autonomy and history, but gave the entirety of the region a greater sense of architectural unity and "charm."<sup>134</sup> Here we might imagine the rise of the six-floor apartment building along the boulevards in Haussmann's Paris, and its ceaseless repetition throughout that city and throughout France and other European capitals. The deployment of such a spatial code, in Lefebvre's view,

is not simply a means of reading or interpreting space: rather it is a means of living in that space, of understanding it, and of producing it. As such it brings together verbal signs (words and sentences, along with the meaning invested in

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132. *Id.* at 44.

If architects (and urban planners) do indeed have a representation of space, whence does it derive? Whose interests are served when it becomes 'operational'? As to whether or not 'inhabitants' possess a representational space, if we arrive at an affirmative answer, we shall be well on the way to dispelling a curious misunderstanding (which is not to say that this misunderstanding will disappear in social and political practice).

*Id.*

133. *Id.*

134. *Id.* at 47-48.

them by a signifying process) and non-verbal signs (music, sounds, evocations, architectural constructions).<sup>135</sup>

Without that code of the apartment building, in other words, the culture of the boulevard would not have evolved, much less the culture of the café, the *flâneur*, or even the *bourgeoisie*. It is no surprise that the French student rebellion of 1968 built fires and road blocks on the boulevards, for those straight streets were the physical embodiment of a law of cities that prioritized the abstractions of a new world order over the individuals who were the neighborhood's previous tenants.

Beyond simply the codes of architecture, the law of cities further abstracted the growth of the city. Lefebvre writes:

It was at this juncture that the idea of *housing* began to take on definition, along with its corollaries: minimal living-space, as quantified in terms of modular units and speed of access; likewise minimal facilities and a programmed environment. What was actually being defined here, by dint of successive approximations, was the lowest possible *threshold of tolerability*.<sup>136</sup>

Suburbs were planned, and here again, "[t]he idea of the 'bare minimum' was no less in evidence. Suburban houses and 'new towns' came close to the lowest possible *threshold of sociability*—the point beyond which survival would be impossible because all social life would have disappeared."<sup>137</sup> The allure of the rational further abstracted spatial distinctions and divisions. Zoning was chief among these tools,

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135. *Id.*

136. *Id.* at 316.

137. *Id.* The history of suburbs in Europe differs in some European cities from the United States. In places such as Paris, high-rises of affordable housing projects predominate. However, what Europeans refer to as "new towns" are similar to typical American suburban communities both in spatial planning requirements, and the general sentiments that often prevail in those communities, including an automobile-oriented lifestyle.

with "[t]he assignment of functions, and the way functions are actually distributed 'on the ground,' becomes indistinguishable from the kind of analytical activity that discerns differences."<sup>138</sup> These differences become tools for discrimination in the guise of rational judgment.<sup>139</sup> In defiance of this abstraction, Lefebvre notes that, "The user's space is *lived* not represented (or conceived). When compared with the abstract space of the experts (architects, urbanists, planners), the space of the everyday activities of users is a concrete one, which is to say, subjective."<sup>140</sup>

Lefebvre's ire falls upon the rise of the planning tradition, with its emphasis on the abstracting tools of comprehensive plans, general plans, and zoning. With these tools, so much of life was reduced to their basic functions—or uses—and each prescribed a size, with dimensions defined by setbacks and other highly technical rationale for an orderly city. These tools

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138. *Id.* at 317.

139. *Id.* at 318.

Abstract space is thus repressive in essence and *par excellence*—but thanks to its versatility it is repressive in a peculiarly artful way: its intrinsic repressiveness may be manifested alternatively through reduction, through (functional) localization, through the imposition of hierarchy and segregation - or through art. The fact of viewing from afar, of *contemplating* what has been torn apart, of arranging 'viewpoints' and 'perspectives', [*sic*] can (in the most favourable [*sic*] cases) change the effects of a strategy into aesthetic objects. Such art objects, though generally abstract, which is to say non-figurative, nevertheless play a figurative role in that they are truly admirable representations of a 'surrounding' space that effectively kills the surroundings. All of this corresponds only too well to that urbanism of maquettes and overall plans which is the perfect complement to the planning of sewers and public works: the creator's gaze lights at will and to his heart's content on 'volumes'; but this is a fake lucidity, one which misapprehends both the social practice of the 'users' and the ideology that it itself enshrines. None of which prevents it in the slightest degree from presiding over the spectacle, and forging the unity into which all the programmed fragments must be integrated, no matter what the cost.

*Id.*

140. *Id.* at 362.

inevitably became the basis for discrimination. For instance, the hierarchy of uses in traditional zoning schemes prioritized single-family homes and thus placed apartment buildings, and thus large sections of the population, typically poor, next to industrial uses that exposed them to health risks.<sup>141</sup> Similarly, definitions of appropriate neighborhoods for mortgage loans turned on factors like the prevalence of rental units in a neighborhood or the prevalence of racial diversity, which were deemed “risk factors,” and thus prevented minorities from accessing mortgages and further exacerbated segregation of the races.<sup>142</sup>

In recognition of these logistical and social failures of traditional zoning structures, an increasing number of jurisdictions are experimenting with visual codes that regulate only the form of the built environment, but not its use. The radical proposition of these codes should not be underestimated, for they do something law has loathed to do: place the visual at center of the law of cities. In these new visual codes, while accompanied by text, it is often the visual diagram itself that conveys the regulations that define proposed development.

A vivid contemporary example of this new effort to address the vices of abstraction are the codes developed by the City and County of San Francisco for a major development to occur on Treasure Island (a small island connected to the City and Oakland by bridges and located in San Francisco Bay). Treasure Island was long a Navy site.<sup>143</sup> When the Navy closed operations there in 1997,<sup>144</sup> Treasure Island was transferred from the Navy to the City of San Francisco for \$105 million<sup>145</sup>

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141. See JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 4.3(C) (2007).

142. KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 197-203 (1985) (discussing “red-lining”).

143. *Former Naval Station Treasure Island*, U.S. NAVAL FACILITIES ENG’G COMMAND, <http://www.bracpmo.navy.mil/basepage.aspx?baseid=44> (last visited Oct. 17, 2012).

144. *Id.*

145. John Cote, *City to Get Treasure Island for \$105 Million*, S.F. CHRON. (Dec. 17, 2009, 4:00 AM), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/12/16/BA6R1B5BR3.DTL>; Press Release, U.S. Dep’t of Navy BRAC Program Mgmt. Off. W., Navy and City of San Francisco

and an agreement signed in 2010.<sup>146</sup>

The City has proposed to develop the island in one master plan. The proposed fifteen-year development<sup>147</sup> is essentially a new town including: up to 8,000 homes, 140,000 square feet of commercial space, and 100,000 square feet of office space; three hotels; a marina and ferry service to San Francisco; and three hundred acres of parks and open space.<sup>148</sup>

In preparing planning codes for this project, the City developed a skeleton planning code text that was accompanied by a massive set of drawings entitled the "Treasure Island + Yerba Buena Island Design for Development" ("Design for Development") plan, which was specifically incorporated into the San Francisco Planning Code.<sup>149</sup> Further, the City's Planning Code specifically stated that development in the special use district governing Treasure Island "shall be regulated by the controls contained [in the Planning Code] and in the Design for Development . . ."<sup>150</sup> The zoning designations in the Code refer back to the Design for Development designations and images;<sup>151</sup> the "tidelands trust" designating public trust lands is delineated in drawings in Design for

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Agree to Treasure Island Conveyance Terms (Dec. 16, 2009), *available at* [http://www.bracpmo.navy.mil/base\\_docs/treasure\\_island/documents/press\\_releases/BRAC\\_PMO\\_TreasureIsland\\_release\\_v16DEC1630.pdf](http://www.bracpmo.navy.mil/base_docs/treasure_island/documents/press_releases/BRAC_PMO_TreasureIsland_release_v16DEC1630.pdf).

146. John Cote & Rachel Gordon, *Deal on Transfer of Treasure Island*, S.F. CHRON. (Aug. 18, 2010, 4:00 AM), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/08/17/BA851EVGB7.DTL>.

147. See TREASURE IS. DEV. AUTH., DISPOSITION AND DEVELOPMENT AGREEMENT, EXHIBIT JJ (2011), *available at* <http://www.sftreasureisland.org/modules/showdocument.aspx?documentid=1056>.

148. *Treasure Island Development Highlights*, CITY & CNTY. OF S.F. TREASURE IS. DEV. AUTH., <http://www.sftreasureisland.org/index.aspx?page=361> (last visited Oct. 17, 2012).

149. S.F., CAL., PLANNING CODE § 249.52(d) (2011), *available at* [http://www.amlegal.com/nxt/gateway.dll/California/planning/planningcode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanfrancisco\\_ca\\$sync=1](http://www.amlegal.com/nxt/gateway.dll/California/planning/planningcode?f=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca$sync=1); TREASURE IS. DEV. AUTH., TREASURE ISLAND AND YERBA BUENA ISLAND DESIGN FOR DEVELOPMENT (2011) [hereinafter DESIGN FOR DEVELOPMENT], *available at* [http://sftreasureisland.org/ftp/devdocs/D4D/12282011\\_FinalTI%20D4D\(Date06282011\).pdf](http://sftreasureisland.org/ftp/devdocs/D4D/12282011_FinalTI%20D4D(Date06282011).pdf).

150. PLANNING § 249.52(e).

151. *Id.* § 249.52(e)(1).

Development;<sup>152</sup> interim uses must be consistent with Design for Development;<sup>153</sup> height is measured as provided in Design for Development;<sup>154</sup> tower bulk massing is described by diagrams in Design for Development;<sup>155</sup> historic resources are designated and their treatment specified in Design for Development;<sup>156</sup> and building permits must be consistent with Design for Development.<sup>157</sup> In short, every significant aspect of the planning of this monstrous project will refer back, at least in part, to a code that has, at its core, a set of illustrated diagrams that convey essential information about the form of the development. Further, the Code also limits the Planning Director's ability to approve or disapprove of a project to the "qualitative Standards and Guidelines" of Design for Development.<sup>158</sup> A Development Agreement, which binds both the City and the developer, underscores Design for Development, and prevents the Planning Commission from imposing conditions of approval that conflict with Design for Development.<sup>159</sup> As such, the Design for Development document is, more than any text, a true picture of what is to be built—or more accurately, what must be built, if anything is to be built at all—than any text could provide. (See Figure 3).

How will the law respond to placing the visual at the core of the legal code? Despite the increasing prevalence of such visual codes, there has been no significant litigation of a visual code at this writing.<sup>160</sup> While the law of cities has canons of construction to interpret texts, it has no such canons for making sense of the visual. It is hard to imagine that a case alleging vagueness, or ambiguity, or some violation of a due

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152. *Id.* § 249.52(e)(1).

153. *Id.* § 249.52(e)(4).

154. *Id.* § 249.52(e)(6)(A).

155. *Id.* § 249.52(e)(6)(C); DESIGN FOR DEVELOPMENT, *supra* note 149, § Y4.5.5, at 261.

156. PLANNING § 249.52(g)(5)(D).

157. *Id.* § 249.52(g)(6).

158. *Id.* § 249.52(g)(4)(C).

159. *Id.* § 249.52(g)(4)(D)(ii).

160. In a review of state and federal cases conducted on July 16, 2012, there was only an ancillary mention that there was an application for form-based code in *Litman v. Toll Bros., Inc.*, 263 F. App'x 269, 271(4th Cir. 2008), which turned on a real estate dispute.

process right, is not inevitable. At that time, the courts will have to decide whether the visual can accurately convey law in a manner that meets the constitutional and statutory requirements for regulations, or whether the visual shall remain disfavored in the eyes of the law.

Beyond the visual's ability to convey legal standards in a manner that meets such constitutional and statutory requirements, the law of cities must evaluate whether these new visual codes succeed in addressing the challenges to place-making proffered by Sennett,<sup>161</sup> legal geography,<sup>162</sup> and Lefebvre.<sup>163</sup> Do visual codes, in any manner, advance questions of diversity, do they advance the need to place the individual in context, or are these visual codes simply another form of zoning's abstractions already created? Treasure Island's codes are instructive. The basis for residential plans is still the unit; the spaces are still segregated by uses; and the uses are regulated by zoning classifications. These basic tenets of space's abstraction to which Lefebvre objected remain. But the Treasure Island visual codes do add specificity to the planning experience, and moreover, that specificity is aimed at seeking a human scale. Drawings that convey legally actionable setback requirements feature people in them walking their dogs. Renderings of the experience on the street, rather than the view of the structures from on high, dominate the Treasure Island's codes. These may be simply the visual's equivalent of rhetorical devices to smooth over planning's fundamental abstractions of space; however, by simply lowering the angle of view to the street from on high, the Treasure Island code offers a chance to speculate about the development's future as a lived experience rather than as an architect's, or a planner's, conception. If we presume that such projects, and the scale of such projects, are inevitable in this era, then the use of visual codes may be simply the best approach available to ensure the perspective of the individual—the city as lived experience—is the primary objective of the planning process.

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161. *See supra* text accompanying notes 120-21.

162. *See supra* notes 1252-31 and accompanying text.

163. *See supra* notes 131-40 and accompanying text.

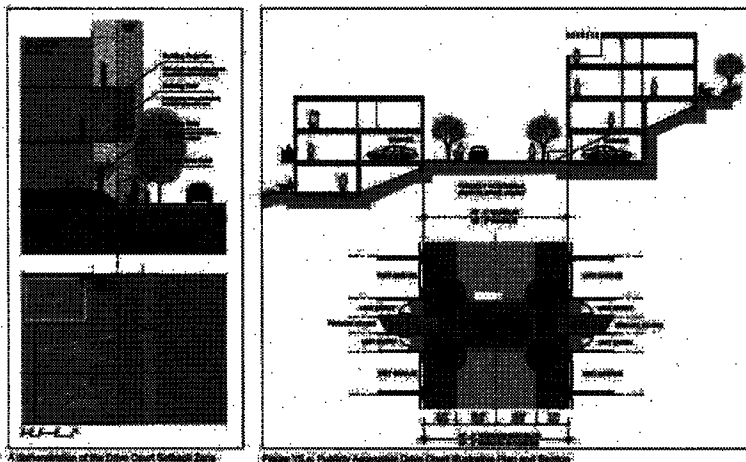


Figure 3. *Treasure Island and Yerba Buena Island Design for Development*<sup>164</sup>

#### VI. Fourth Tableau: Representation of Space and Edward Hopper

*"Many are the cities . . . which elude the gaze of all, except the man who catches them by surprise."*<sup>165</sup>—Italo Calvino

In this final tableau, the article turns to the relation between the law of cities and the visual arts. In a sense, the turn to the visual arts is a natural extension of the law and literature movement. Peter Brooks has written:

The law and literature movement has arisen in large part from those who believe that law needs to be accountable to more than itself, to more than the legal institution, its languages and rituals. It needs to be tested against the realm of human value to which literature speaks—not in any simple sense of moral uplift but in its

164. DESIGN FOR DEVELOPMENT, *supra* note 149, at 271.

165. ITALO CALVINO, *INVISIBLE CITIES* 24 (William Weaver trans., 1974) (1972).



address to the human condition.”<sup>166</sup>

Perhaps more than literature, though, the visual arts generally and especially paintings focusing on cities as subjects, can play a similar role for the law of cities because what this body of law produces and regulates is so tangible: the place in which we live, which is physical. In considering the role that the visual arts can play for the law of cities, this article will first seek to explore the nature of landscape painting, its choices and rhetorics, as analyzed by philosopher Edward Casey, before turning to the paintings of Edward Hopper, as an example of how the visual arts can dialogue with the law of cities.

Casey starts from the premise that “[t]he problem of representing landscape can be seen as a quandary of *containment*.”<sup>167</sup> The experience the landscape painter seeks to portray goes beyond what could ever be adequately presented on the canvas, both in size and also in feeling.<sup>168</sup> As Casey puts it, “How can the decisively determinate [of the picture frame] contain the inestimably indeterminate?”<sup>169</sup> As a result, “[p]ainterly representations are genuine *presentations*. They seek to present, not to *represent*; they strive to show, not to replicate.”<sup>170</sup> Casey argues that the landscape painting is not merely a recordation of a particular scene, but rather the landscape painter using memory of the entire region in order to present the “placial specificity and felt vicinage.”<sup>171</sup> Casey argues further:

To *know* a region is to be fully acquainted with it as it is spread out in space (i.e., as visible from “numerous angles”) and as it is distended in time

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166. Peter Brooks, *Literature as Law's Other*, 22 YALE J.L. & HUMAN. 349, 356 (2010).

167. EDWARD S. CASEY, REPRESENTING PLACE: LANDSCAPE PAINTING & MAPS 7 (2002) (emphasis in original).

168. See *id.* (“[T]he issue is how something that, by its very nature, overflows ordinary perception can be represented by something else that, by its very nature, can only present itself to the viewer as a discrete object with definite dimensions and often within a delimited frame.”)

169. *Id.*

170. *Id.* at 18.

171. *Id.* at 75.

(i.e., as it changes “over time”). . . . To know a region is also to be able to *remember* it. . . . More important still is the fact that *only through memory is knowledge of an entire region sustained*. We encounter here a quite fundamental condition of representability, a condition of painting any landscape that conveys more than a momentary glimpse of its layout. Confronted with the spatially and temporally expansive character of a given region, a landscape painter draws upon his or her memory of numerous experiences of that region in order to hold together otherwise disparate experiences—and to be adequate to the complexity of the region itself.<sup>172</sup>

The painter then uses these multiple experiences and histories of experience in the region to put into one painting the experience of the entirety of that place.<sup>173</sup> The particulars of the painting—rocks, trees, streets, what have you—are not simply representations of a specific place, but of the region itself.<sup>174</sup> As such, the physical objects in landscape painting can have their shape varied by apparent size, position, and the shape and size of the canvas.<sup>175</sup>

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172. *Id.* at 76.

173. *Id.* at 81.

Just as it is possible to remember the same thing but in different ways—for example, with varying emotional tonalities—so the painter of a region may render the leading features of its constituent places in various versions. These versions reinstate one and the same scene, a given haunt, as it presents itself in several acts of perceiving as well as in the history of the painter’s remembrances.

*Id.*; see also *id.* at 89 (“The place at stake in regional re-implacement cannot be reduced to position or ‘simple location.’”); *id.* at 90 (“To capture the sublimity of a natural scene, the landscape painter must anchor experience and memory and imagination in representations that are as place-specific as they are region-reflective.”).

174. *Id.* at 82.

175. *Id.* at 83-84.

Edward Hopper illustrates Casey's vision of how paintings work with space, and also how the law of cities and the visual arts can speak to each other. Hopper was one of the twentieth century's great "realist" painters, so labeled because he did not indulge in the decade's more popular schools of abstraction.<sup>176</sup> His prolific work spanned the century's first six decades and focused primarily on city street scenes in New York City; however, he also painted rural street scenes, railroads, lighthouses in Maine, and rural scenes near his summer house near Truro, Massachusetts, on Cape Cod, and around Gloucester, Massachusetts.<sup>177</sup> He painted where he lived, and occasionally, where he travelled, such as Paris in his early years, as well as on later trips to the American South and West.<sup>178</sup>

Hopper's method of painting was evocative of Casey's notion that the landscape artist is not simply representing a particular landscape, but instead interpreting the landscape through the artist's personal understanding of the larger region. Some art critics during Hopper's life viewed his work essentially as photography.<sup>179</sup> From early in Hopper's career up to this day, a cottage industry has emerged trying to find the exact location and angle of Hopper's paintings. While some locations can be found that are remarkably similar to Hopper's paintings, there is always a variation—sometimes small,

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176. See GAIL LEVIN, EDWARD HOPPER: AN INTIMATE BIOGRAPHY 187 (1995) [hereinafter HOPPER BIOGRAPHY]. Levin's book is far-and-away the most influential, and most-cited biography of Hopper, and so is used extensively for biographical information in this article.

177. See generally *id.*

178. *Id.* at 48-70 (Paris), 221-22 (Charleston, S.C.), 190-93 (Sante Fe, N.M.), 337-42 (American West).

179. HOPPER BIOGRAPHY, *supra* note 176, at 396. Clement Greenberg, who had championed the Abstract Expressionists, wrote in the *Nation* that

Hoppers painting is essentially photography, and it is literary in the way that the best photography is. Like Walker Evans's and Weegee's art, it triumphs over inadequacies of the physical medium. . . . Hopper simply happens to be a bad painter. But if he were a better painter, he would, most likely, not be so superior an artist.

sometimes large—between what is there in real life, and what is there in Hopper's painting.<sup>180</sup> In a telling anecdote, John Maass, discovered two houses in Haverstraw, just north of Nyack, New York, and wrote to Hopper in the mid-1950s to inquire about the exact location of the house that appears in Hopper's 1925 *House by the Railroad*.<sup>181</sup> Jo, Hopper's wife, responded to Maass, "[h]e did it out of his head. He has seen so many of them."<sup>182</sup> This was not unusual for Hopper, who routinely painted indoors and from memory, but always based upon an intense study of his subject region.<sup>183</sup>

As Casey proposed of landscape painters generally, Hopper long maintained that the purpose of painting, even of landscapes of seemingly recognizable locations, was primarily one of expressing an artist's interior thoughts and feelings.<sup>184</sup> In one of his few statements on the nature of art, Hopper wrote:

Great art is the outward expression of an inner life in the artist, and this inner life will result in his personal vision of the world. No amount of skillful invention can replace the essential element of imagination. One of the weaknesses of much abstract painting is the attempt to

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180. See, e.g., Gail Albert Halaban, *The Original Hoppers*, N.Y. TIMES MAGAZINE (July 20, 2012), <http://www.nytimes.com/interactive/2012/07/22/magazine/hopper-houses.html> (comparing Hopper paintings and photographs of subjects of same).

181. HOPPER BIOGRAPHY, *supra* note 176, at 195.

182. *Id.* (internal quotation marks omitted).

183. *Id.* at 371. Jo, writing of Hopper's painting in Provincetown:

He cares only for the common denominator in houses, roads, etc. & is not beguiled by so much individuality. He no longer cares to work out from the thing, wants only to make sketches here & there & compare his own subjects in the studio which is much more comfortable, heaven knows. We know all about working in a cold wind or with mosquitoes or knats [*sic*] or nose-ums plagueing [*sic*] the life out of one, & the publicity of working out too is so distracting, insufferable for E[dward].

*Id.*

184. See *id.* at 438.

substitute the inventions of the intellect for a pristine imaginative conception. The inner life of a human being is a vast and varied realm and does not concern itself alone with stimulating arrangements of color, form, and design.<sup>185</sup>

Rather, Hopper maintained that abstraction, whether in painting or in life, leads us away from the specificity of our being and the need to engage with that environment. Hopper wrote:

There is a school of painting called abstractionist or non objective which is derived largely from the work of Paul Cézanne, that attempts to create "pure painting" that is, an art which will use form, color and design for their own sakes, and independent of man's experience of life and his association with nature. I do not believe such an aim can be achieved by a human being. Whether we wish it or not we are all bound to the earth with our experience of life and the reactions of the mind, heart, and eye, and our sensations, by no means, consist entirely of form, color and design. We would be leaving out a great deal that I consider worth while [sic] expressing in painting, and it can not [sic] be expressed in literature.<sup>186</sup>

For these same reasons, the law of cities must find ways to connect with the visual arts as other aspects of the law have with literature. The experience of place is physical, and when reduced to words, descriptions of places become subject to the tropes, conventions, and expectations of written word. Notably, we ask whether it is fiction or non-fiction, whether there is a narrative thread, whether the story is compelling. In that way, we turn away in literature from the place itself to evaluate the art of the text. The law of cities deserves a relationship with an

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185. *Id.* at 460.

186. *Id.* at 401.

art that seeks to represent the physical in a manner in which we primarily experience it: through the visual. To be a dialogue of use to the law of cities, though, that art cannot simply represent the city as it is, for the law of cities is already inundated with evidence of the city of how it is in maps, technical drawings and the like. What Casey posits, and Hopper seconds, is that it is the visual artist's use of memory and internalization of a location that permits the visual artist to present a place more truly than the place could ever present itself in life or on a map. It is that sense of place that the visual arts provides to the law of cities—the ability to dialogue with the place in a way that is not on a map or a title description—that speaks to, and adds richness to, the place that is bound by legal description.

Hopper saw this at work in small ways, and in big terms. He was long considered an “American” painter<sup>187</sup> and as embodying the “American Scene,”<sup>188</sup> but these descriptions also

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187. *Id.* at 494. Hopper said for a *Time* cover story in 1956,

The thing that makes me so mad is the “American Scene” business . . . I never tried to do the American scene as Benton and Curry and the midwestern painters did. I think the American Scene painters caricatured America. I always wanted to do myself. The French painters didn't talk about the “French Scene,” or the English painters the “English scene.”

*Id.*

188. *Id.* at 234. In the March, 1927 edition of *The Arts*, Lloyd Goodrich referred to Hopper as an “eminently native painter,” and stated, “It is hard to think of another painter who is getting more of the quality of America into his canvases than Edward Hopper.” *Id.* at 203. Levin writes:

The call for an authentic American art had already sounded in Emerson's essay, “Self-Reliance,” which Hopper would cite in his next major essay on an American artist: An why need we copy the Doric or the Gothic model? Beauty, convenience, grandeur of thought and quaint expression are as near to us as to any, and if the American artist will study with hope and love the precise thing to be done by him, considering the climate, the soil, the length of the day, the wants of the people, the habit and form of the government, he will create a house in which all these will find themselves fitted, and taste and sentiment will be satisfied also.

bothered him precisely because it was a nationalistic abstraction, and belied the specificity of individual places that he thought should have priority, and to which his work paid homage. Hopper wrote, in preparation for a show:

I hope though that in the publicity to be given this show there will be no reference to the "American Scene." . . .

If one looks out of one's window in Ohio, Massachusetts, or California, and reports honestly what one sees and feels with one's personal vision of the world in command, that will be one's interpretation of the American scene. It is part of our daily existence. Even the mystics can not [*sic*] ignore it.<sup>189</sup>

Out of these two aspects of Hopper—the filtering of the environment through his interior and personal experience and his commitment to the particular scene—a dialogue between the visual arts and the law of cities emerges. For one of the perpetual dilemmas in the law of cities is for whom the law exists. For some, the overarching concern is property rights, and the desire to maintain those rights. But if such a legal regime begins to approach a Hopper painting, it must contend with a very personal reaction and interpretation of the city found in a Hopper work. Independent of the question of property rights—highly abstract concepts—the city is the space of life where individual subjects, like Hopper, seek a personal vision of the world in their environment. The law of cities, to the extent it purports to defend anything of individual liberties, has to take into account how to address this personal vision and the interior life of those whose lives go on in the midst of law's abstractions.

To further evaluate these concepts, the remainder of this tableau will focus on several ways in which Hopper specifically engaged with the evolution of cities. Hopper lived on

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*Id.* at 204-05.

189. *Id.* at 480.

Washington Square Park in New York City<sup>190</sup> at a time when it was transitioning from a square dominated by residential buildings reminiscent of the gilded era of Henry James novels,<sup>191</sup> to its modern incarnation, dominated by mid-rise skyscrapers. At the center of the transition was New York University, which Hopper fought on both its larger ambitions as well as its efforts to remove Hopper from his home on the square.<sup>192</sup>

Two aspects of this dispute are especially evident in Hopper's painting and relevant to the law of cities: the scale of cities and the transformation of a neighborhood. Skyscrapers are notably absent from most of Hopper's paintings, especially for a painter of New York City in the first half of the twentieth century. When present, skyscrapers are often in the distance and typically cutting a jagged hole in an otherwise fully formed and human-scaled city scene. A classic example is *The City*, a painting in which Hopper took a cinematic bird's-eye view of Washington Square Park, then an elegant array of brownstones and mansard roof-topped buildings, but also portrayed in the distance, a skyscraper looms, cut off by the top of the frame.<sup>193</sup> The painting represents Hopper's ambivalent attitude towards skyscrapers, as well as the changing face of the twentieth century generally.<sup>194</sup> Hopper considered

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190. *Id.* at 247.

191. *See, e.g.*, HENRY JAMES, WASHINGTON SQUARE (1880).

192. HOPPER BIOGRAPHY, *supra* note 176, at 395.

193. *Id.* at 201.

He shared the climate of opinion that would find voice in critics like Lewis Mumford, who soon published articles with such titles as "Is the Skyscraper Tolerable?" and "Botched Cities." For them, the skyscraper represented everything that was wrong with modern urban America, from the superficiality of material values to the increased standardization of life.

*Id.*

194. *Id.* at 229.

He rarely represented skyscrapers at all, and when he did, he reduced them to fragmentary glimpses or intrusions on the cityscape. . . . His recurrent visual ironies on the manifestations of modern life suggest his highly ambivalent



American Victorian architecture the country's native style, and his sentiments allied with Henry James, who argued that skyscrapers "never begin to speak to you, in the manner of the builded [*sic*] majesties of the world as we have heretofore known such—towers or fortresses or palaces—with the authority of things of permanence or even of things of long duration."<sup>195</sup>

From the contemporary perspective, given over to skyscrapers, Hopper's perspective can appear quaint, dated, even conservative. But it is also evocative of something that happens all the time in cities: changes of use and changes of scale. Such changes, such as the arrival of skyscrapers on Washington Square, can be viewed as a matter of property rights, or as a matter of newly available building materials, or as an evolution of taste and style. But Hopper's position is indicative of a perspective that is almost always undervalued by the law of cities: the perspective of the person whose life is changing, whose neighborhood is disappearing. Hopper's tension with skyscrapers in his paintings gives the law of cities a chance to imagine the perspective of a person whose neighborhood is lost and will soon be gone. Such perspectives are also evident in Hopper's 1932 painting *City Roofs*, in which Hopper painted a view from the rooftop of his studio. "[P]artially visible on the back right side of the canvas is a pale yellow skyscraper recently built at One Fifth Avenue."<sup>196</sup> Its imposing scale tells a similar story of the evolution of cities, and the sense of loss Hopper felt for the older, smaller scale of the neighborhood.

The resulting effects of the law of cities are, in fact, a city. Paintings of specific locations, as Casey notes, are representations not just of a scene of the city, but are intended to evoke the broader experience of the city or region: what

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attitude toward the changes occurring in the twentieth-century society; it is his profound alienation from contemporary life that makes his art so characteristic of modernity itself.

*Id.*

195. *Id.* at 279-80.

196. HOPPER BIOGRAPHY, *supra* note 176, at 247.

Hopper painted of Washington Square was true of all Manhattan, not to mention most urban American cities of the time. A dialogue with such paintings does not directly affect any right to develop, but it does bring to question the effects of development on individuals who live in cities. As Lefebvre noted, it is the lived space that ultimately matters most to the individual, because it is the location of experience.<sup>197</sup> Planning for dwelling units, for housing units, reducing vehicle miles traveled, or whatever the planning regime may proffer—not to mention the abstractions of individual property rights—all may fail to acknowledge that cities are not just machines for living, but for the living of individual lives.

A dialogue with the visual arts is a step toward softening the hard film of abstraction that accretes when the law of cities plans the future. The question emerges: should the law of cities incorporate experience with visual arts into law itself? Even if law remains textual in its form, as it is likely to do in substantial part, the law of cities benefits from engaging with lived experience, as does any aspect of law. When the law of cities engages with how cities are lived, we come closer to building legal regimes that build places that feel like home. If literature is generally law's other, as Peter Brooks posits,<sup>198</sup> we may go one step further here: the visual arts are equally the other of the law of cities, each entwined and enmeshed in the other's vision of itself. For though a walk outside can give one impression of the city, the visual arts that focus on cities, can provide an image that contains more, as Casey would say, than a walk along all of the city streets could ever do. And while the essence of a city—even an essence of diversity, especially an essence of diversity—will never find its way into law directly from a painting, the law of cities should strive to maintain what its inhabitants seek for it to be. Paintings, such as those of Hopper, offer a window into what a place is that the law of cities necessitates.

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197. See *supra* text accompanying note 138.

198. See *supra* text accompanying note 166.

## VII. Conclusion

At first blush, it is arguable for some that the role of the visual in the law of cities is narrow, perhaps even esoteric, with regard to other concerns. Against such claims, one need only recall the vast distances covered here: the cultural and legal value of maps, the legal role of aesthetics in building cities, the production of space through the abstractions of zoning and planning, and the role of the visual arts in informing the law of cities. Drawn in such relief, the questions of the visual in the law of cities emerge from the incidental, and law's general inattention to the visual begins to seem inexcusable.

A blind statue of justice makes clear the law's general preference that the visual be excommunicated from the law's work. Above all else, the tableaux of this article illustrate that the visual and the law of cities are inextricably linked. To the extent the general legal bias against the visual is applied in the law of cities, such bias obscures the law of cities' ability to see clearly its own functions and the role of the visual in them.

Such blindness is not without danger. As the first two tableaux on *diseños* and aesthetics revealed, cultural biases are often embedded in the visual. As the last two tableaux on the production and representation of space revealed, the relative abstraction of legal regimes can belittle, even hide, the experience and needs of the individual. Acknowledging, and openly confronting, the role of the visual in the law of cities makes it more likely that the law will adequately address the potential problems associated with the visual that may arise in the quotidian functioning of legal practice, while also permitting the visual to provide more powerful tools, and a richer exchange of ideas, about the values and choice undergirding how the law of cities guides the development of where we live.

Teaching the law of cities to see the visual does not rewrite any law outright, but does make the law of cities more honest in its machinations, and brings into the discussion an approach to the visual of cities beyond aesthetics, one that embraces the visual as the "other" of the law of cities. This asks of more than beauty to inquire in detailed ways how a city becomes a home for its inhabitants, and how inhabitants

respond and reflect upon changes in the city, such as the city's inevitable changes in scale and use. These are several ways the visual is uniquely qualified to assist the law of cities achieve its ends. With continued dialogue on this subject, more uses of the visual in the law of cities are certain to emerge and further the creation of cities that evince what Wallace Stegner once called a "sense of place."<sup>199</sup>

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199. See generally WALLACE STEGNER, *THE SENSE OF PLACE* (1986).